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STATE RESPONSIBILITY

Draft articles, with commentaries, adopted by the Commission for inclusion in Part Three and the Annex thereto

GE.95-62947 (E)

Part Three and the Annex

Introduction

(1) Since the earliest days of its work on the topic of State responsibility, the Commission has considered the possibility of including in the draft articles a part three containing provisions relating to the implementation (mise en oeuvre) of international responsibility and the settlement of disputes. At its fourteenth session in 1962, the International Law Commission decided to establish a Sub-Committee on State Responsibility to consider general aspects of the topic. Members of the Sub-Committee were requested to submit memoranda relating to the main aspects of the topic. Two of the members, namely Mr. Tsuruoka 1/ and Mr. Paredes, 2/ submitted papers in which they emphasized the importance of addressing dispute settlement procedures. However, the initial two-part programme of work for the topic of State responsibility that was proposed by the Sub-Committee and endorsed by the Commission at its fifteenth session in 1963 did not envisage a part three. 3/

(2) At its twenty-first session in 1969, the Commission began its substantive work on the topic of State responsibility with its consideration of the first report 4/ of Mr. Ago, the Special Rapporteur for the topic. 5/ At that session, the Commission reviewed its plan of work on State responsibility and decided to consider at a later stage the possibility of undertaking a third phase of work covering certain problems concerning the implementation of the international responsibility of a State and questions concerning the

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1/ Mr. Tsuruoka, submitted a paper in which he asserted that the principles to be included in a State responsibility convention would be ineffective and possibly remain inoperative in the absence of guarantees for their strict application. Yearbook ... 1963, vol. II, pp. 248-249, document A/5509, appendix II.

2/ Mr. Paredes submitted a memorandum entitled "An approach to State Responsibility" in which he outlined detailed proposals relating to the settlement of disputes. Ibid., pp. 245-246.

3/ Ibid., p. 227 et seq., annex I, document A/CN.4/152.

4/ Yearbook ... 1969, vol. II, p. 125, document A/CN.4/217 and Add.1.

5/ The Commission appointed Mr. Ago as Special Rapporteur for the topic at its fifteenth session in 1963.

settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility. 6/ The Commission's plan to proceed with its work on the topic in successive stages, including the possibility of a third stage relating to dispute settlement, met with general approval when the Commission's annual report was considered in the Sixth Committee of the General Assembly. 7/ At its subsequent sessions, the Commission consistently confirmed its intention to consider a possible part three of the draft articles.

(3) At its thirty-seventh session in 1985, the Commission began its consideration of a possible part three concerning the settlement of disputes based on the sixth report 8/ of Mr. Riphagen, the Special Rapporteur for the topic. 9/ While some members advised caution in the elaboration of dispute settlement provisions in the light of the hesitancy of States to accept third party procedures, such provisions were generally considered to be necessary for the implementation of the first two parts of the draft articles given the likelihood of disputes relating to State responsibility as well as the possible escalation of such disputes as a consequence of countermeasures. 10/

(4) At its thirty-eighth session in 1986, the Commission had before it the seventh report 11/ of Mr. Riphagen which contained draft articles for Part Three and the related Annex. The Commission considered the proposed draft articles in plenary and subsequently referred them to the Drafting

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6/ Yearbook ... 1969, vol. II (Part Two), p. 233, document A/7610/Rev.1, paras. 80-82.

7/ Official Records of the General Assembly, Twenty-first Session, Annexes, agenda items 86 and 94 b, document A/7746, paras. 86-89.

8/ Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389.

9/ The Commission appointed Mr. Riphagen as Special Rapporteur for the topic at its thirty-seventh session in 1979.

10/ Yearbook ... 1985, vol. II (Part Two), p. 24, document A/40/10, paras. 159-161.

11/ Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

Committee. 12/ Since the referral to the Drafting Committee of the proposed draft articles comprising Part Three and the Annex, the Commission has assumed that provisions relating to the settlement of disputes would be included in the draft articles on State responsibility. 13/

(5) At its forty-fifth session in 1993, the Commission continued its consideration of issues relating to implementation and dispute settlement procedures based on the fifth report 14/ of Mr. Arangio-Ruiz, the Special Rapporteur on the topic. 15/ The Commission considered the new proposed draft articles comprising Part Three and the Annex and referred them to the Drafting Committee, which also had pending before it the proposals of the previous Special Rapporteur on the same subject. 16/

(6) The present Special Rapporteur - following in part his predecessor Professor Riphagen - envisaged different dispute settlement obligations depending on whether compliance with such obligations would be meant, under the future State responsibility convention, to precede or to follow the taking of countermeasures. The first set of obligations - which would not derive from the convention - was contemplated in draft article 12 (as proposed by the Special Rapporteur in his fourth report). According to this article, no countermeasures could lawfully be taken by an injured State prior to: "(a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party; and (b) appropriate and timely communication of its intention." 17/ Such conditions would not apply,

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12/ Yearbook ... 1986, vol. II (Part Two), pp. 36-37, document A/41/10, paras. 41-46.

13/ Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Supp. No. 10, p. 34, document A/47/10, para. 108.

14/ Document A/CN.4/453.

15/ The Commission appointed Mr. Arangio-Ruiz as Special Rapporteur for the topic at its thirty-ninth session in 1987.

16/ Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Supp. No. 10, p. 80, document A/47/10, para. 205.

17/ Document A/CN.4/444, para. 52.

however, in the case of urgent measures of protection and whenever the wrongdoing State did not cooperate in good faith in the choice and implementation of the available settlement procedures. Thus, draft article 12, as envisaged by the Special Rapporteur, would not create any new dispute settlement obligations. It would merely rely on dispute settlement obligations originating in sources other than the convention and undertaken before or after the entry into force thereof.

(7) In contrast, Part Three, as proposed by the Special Rapporteur in his fifth report, was meant to establish new dispute settlement obligations for State parties in relation to disputes that arose after the taking of countermeasures. 18/ The proposed procedures envisaged conciliation, arbitration or judicial settlement to be resorted to unilaterally by either party for the settlement of any dispute which had arisen following the adoption of countermeasures and which was not settled by resort to the procedures referred to in article 12 (1) (a) or submitted to a binding third party settlement procedure within a reasonable time limit. In the Special Rapporteur's view, the two sets of dispute settlement proposals contemplated in article 12 and Part Three should have been considered by the Drafting Committee jointly in view of the close interrelationship and possible interaction between them.

(8) Indeed, the parties to a future State responsibility convention could be bound by all kinds of dispute settlement obligations deriving either from multilateral treaties (such as the United Nations Charter or regional instruments), bilateral treaties or compromissory clauses or unilateral declarations of acceptance of the Optional Clause of Article 36 of the Statute of the International Court of Justice. As had rightly been pointed out by a number of members in the course of the present session, the problem of the coexistence of the dispute settlement obligations to be envisaged in Part Three with any other dispute settlement obligations of the participating States, whether undertaken prior or subsequent to their participation in the convention, obviously arose regardless of the solutions originally proposed by the Special Rapporteur in draft article 12 (1) (a). The Special Rapporteur found it therefore doubly regrettable that, due to the need to give priority to other topics in 1993, 1994 and 1995, the Drafting Committee had been unable

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18/ Document A/CN.4/453/Add.1 and Corr.1-3.

to elaborate all the dispute settlement provisions simultaneously in such a way as to be able to take account of any interaction between the dispute settlement obligations arising from the future State responsibility convention, on the one hand, and dispute settlement obligations deriving from any other source (including other codification conventions), on the other hand.

(9) The Commission recognized that the adoption of the articles contained in Part Three and the Annex was without prejudice to its future work on any related aspects of the subject matter. The Commission recognized, in particular, the need to consider the problem of the coexistence of dispute settlement obligations under Part Three of the State responsibility draft with any dispute settlement obligations deriving from any other instruments preceding or following the coming into force of a State responsibility convention. The Commission agreed to adopt the draft articles contained in Part Three and the Annex on the basis of these understandings with respect to its future work.

(10) Finally, the Commission also recognized that in resuming work on dispute settlement, it should also consider the proposal contained in the Special Rapporteur's seventh report concerning the settlement of disputes relating to the internationally wrongful acts characterized as State crimes under article 19 of Part One of the draft.

Part Three

Settlement of Disputes

Article 1

Negotiation

If a dispute regarding the interpretation or application of the present draft articles arises between two or more States Parties to the present draft articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Commentary

(1) Article 1 provides for negotiations as a possible first step in the general dispute settlement system. The broad reference to "a dispute regarding the interpretation or application of the present draft articles" indicates that this provision is part of the general dispute settlement provisions. The consideration of negotiation in the first article of Part Three identifies this method of dispute settlement as the first step in the general dispute settlement system. Negotiation is often the first step in any dispute settlement process either as a means of settling the dispute or

reaching agreement on an appropriate dispute settlement procedure or implementing a pre-existing dispute settlement arrangement, for example, by determining the factual issues and the legal issues that constitute the dispute that is to be resolved. The use of the term "negotiation" does not exclude the possibility that the parties may also engage in "consultations" during this first step in the dispute settlement process.

(2) Article 1 provides for negotiation at the request of any party to a dispute relating to the interpretation or the application of the present draft articles. This article recognizes that such a dispute may arise "between two or more States Parties to the present draft articles". The phrase "upon the request of any of them" is used to indicate that the negotiations may be instituted upon the unilateral request of either an injured State or an allegedly wrongdoing State.

(3) The compulsory nature of the negotiation procedure is indicated by the use of the phrase "they shall". The request by one party to the dispute gives rise to the obligation on the part of all parties to the dispute to participate in the negotiations in good faith with a view to settling the dispute. The initiation of the negotiations by "request", a formality that is not usually required for negotiations, is intended to avoid any ambiguity as to the event that gives rise to the obligations of all parties to endeavour to resolve it by negotiation. The phrase "seek to settle it amicably by negotiation" indicates that the obligation to negotiate is one of means rather than result. The parties to the dispute are obligated only to negotiate and not to settle the dispute by means of negotiation. The term "amicably" is used to indicate the conditions that should prevail between the parties in conducting the negotiations with a view to reaching an agreed settlement of their dispute.

(4) The procedural obligation to negotiate provided for in the present article represents a possible restriction on the freedom of choice of the parties to the dispute with respect to settlement procedures in the absence of a more rigorous agreed procedure. However, the parties retain complete control over the compulsory negotiation procedure because of the absence of any third party participation. Furthermore, the results of the negotiations are binding on the parties only to the extent that they agree on a settlement or a settlement procedure.

Article 2

Good offices and mediation

Any State Party to the present draft articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Commentary

(1) Article 2 provides for good offices or mediation as a possible further step in the general dispute settlement system. This provision applies to the same broad category of disputes as contemplated in the preceding article.

(2) There are two ways in which the good offices or mediation procedure envisaged in the present article may be initiated. First, a State which meets the two criteria required to perform the role of the third party in these procedures "may, upon its own initiative ... tender its good offices or offer to mediate". The State must be a party to the draft articles on State responsibility. Any State which is a party to a convention has an interest in the resolution of disputes relating to the interpretation or the application of its provisions. In addition, the third State must not be a party to the dispute. The objectivity and impartiality of the third party is essential to the effective performance of its role in facilitating the resolution of the dispute between the parties. The recognition of the right of such a State to offer to assist the parties in resolving their dispute is intended to avoid the possibility of such an offer being viewed by the parties as an inappropriate attempt to intervene in their dispute. Second, any party to the dispute may request the good offices or mediation procedure envisaged in article 2. The third party procedure initiated by the request of a party to the dispute may be conducted by any State which meets the two criteria.

(3) The second step in the general dispute settlement system is consensual in nature with respect to both the initiation of the procedure and the settlement of the dispute at the conclusion of the procedure. While either the injured State or the wrongdoing State may request good offices or mediation, this third party dispute settlement procedure can be initiated only with the agreement of the parties to the dispute. In this regard, article 2 is consistent with the freedom of choice principle with respect to dispute settlement procedures. Furthermore, the role of the third party is limited "to facilitating an amicable resolution of the dispute." The resolution of the dispute as a consequence of this procedure will depend upon the agreement of the parties to the dispute. The term "amicable" is used to indicate the conditions that should prevail between the parties in seeking to achieve an agreed settlement of their dispute by means of the agreed third party procedure.

(4) It is not necessary for the parties to the dispute to have either initiated or completed the compulsory negotiations envisaged in article 1 before agreeing to good offices or mediation under article 2. The parties may agree to attempt to resolve their dispute with the participation of a third party under either of these procedures without any party to the dispute having initiated the compulsory negotiations provided for in article 1. Even if such negotiations have been initiated, the parties may decide that the dispute is unlikely to be resolved by negotiation and agree to proceed to a third party procedure such as those envisaged in article 2. The good offices or mediation procedure may also be viewed as auxiliary to the negotiations of the parties since the purpose of these third party procedures is to facilitate an agreed settlement of the dispute by the parties.

Article 3

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present draft articles.

Commentary

(1) Article 3 provides for conciliation as a possible third step in the general dispute settlement system. This article applies to the same broad category of disputes as the two preceding articles. Similarly, the 1949 General Act for the Pacific Settlement of International Disputes provides in article 1 for conciliation in the event that the parties to a dispute are unable to resolve it by means of diplomacy. 19/ The 1969 Vienna Convention on the Law of Treaties also provides in article 66 for conciliation if a dispute cannot be resolved by the parties through the means listed in Article 33 of the United Nations Charter. 20/

(2) The present provision is intended to address situations in which a dispute has not been resolved within a reasonable period by the compulsory negotiations envisaged in article 1 and no binding third party dispute settlement procedure has been instituted. Any party to the dispute may

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19/ United Nations, Treaty Series, vol. 71, p. 101.

20/ United Nations, Treaty Series, vol. 1155, p. 331.

initiate unilaterally the conciliation procedure provided for in the present article if two conditions are met. First, the parties to the dispute have failed to reach an agreed settlement of their dispute by whatever means three months after the request for negotiations under article 1. Second, the parties have failed to actually institute and submit their dispute to a binding third party settlement procedure by the end of the same period.

(3) The first condition is intended to give the parties to the dispute a reasonable opportunity to settle their differences without the intervention of a third party. The conciliation procedure provided for in the present article cannot be activated until the parties have attempted to resolve their dispute by means of negotiation for a reasonable period. The 1949 Revised Geneva Act for the Pacific Settlement of International Disputes provides for a similar approach.

(4) The second condition is intended to give preference to the freedom of choice of the parties with respect to the selection of a more rigorous binding third party procedure to settle their dispute. There are two ways in which the parties may institute such a procedure. The parties may institute a binding third party procedure on the basis of a prior agreement or arrangement, for example, a general dispute settlement agreement, an applicable treaty containing a specific dispute settlement provision, or the prior acceptance by the parties of the optional clause contained in Article 36 of the Statute of the International Court of Justice. The parties may also institute such a procedure pursuant to an agreement adopted subsequent to the dispute for the specific purpose of resolving that dispute. The phrase "has been instituted" is very important. It is intended to ensure that the dispute has actually been submitted to a binding third party procedure in one way or the other.

(5) Article 3 permits a party to unilaterally initiate conciliation to avoid the possibility of lengthy negotiations being used as a pretext by one of the parties to delay the settlement of the dispute. Three months was considered to provide the parties with a sufficient period to determine whether it could be resolved by means of negotiation, and, if not, to institute a binding third party procedure of their choice. Both parties may agree to continue the negotiations if neither party decides to unilaterally institute the conciliation procedure envisaged in the present article.

(6) The injured State or the allegedly wrongdoing State may submit the dispute to conciliation under the present article without the consent of any other party to the dispute if the necessary conditions are met. The compulsory nature of the conciliation procedure provided for in the present article constitutes a step forward in the area of dispute settlement procedures by providing for the participation of a third party in the settlement of the dispute without the consent of all of the parties to the dispute. However, the results of the conciliation are binding on the parties only to the extent that they reach an agreed settlement.

(7) The constitution and the task of the conciliation commission are determined by the Annex and the succeeding article for the purpose of ensuring that the compulsory conciliation procedure envisaged in the present article is not delayed or precluded by the failure of the parties to agree on such matters.

Article 4

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Commentary

(1) Article 4 sets forth the task of the Conciliation Commission provided for in the preceding article. Paragraph 1 defines in broad terms the general task entrusted to the Conciliation Commission, namely (1) to elucidate the questions of law or fact that are disputed by the parties, (2) to collect the information required to shed light on those questions by means of inquiry or otherwise and (3) to endeavour to bring the parties to an agreed settlement of their dispute. This paragraph is similar to article 15 of the Revised General Act for the Pacific Settlement of International Disputes 21/ and article 15 of the 1957 European Convention for the Peaceful Settlement of Disputes. 22/ The remaining paragraphs address in greater detail the performance of this general task in four possible stages.

(2) Paragraph 2 addresses the information gathering stage of the conciliation procedure. The starting-point for the work of the Conciliation Commission is the ascertainment of the position of the parties to the dispute and the identification of the areas of agreement or disagreement. The parties have an obligation to provide the Conciliation Commission with "a statement of their position regarding the dispute and of the facts upon which that position is based" as the first step in the information gathering stage. The Conciliation Commission may require additional information for a proper determination of the relevant facts that are at issue between the parties. Thus, the parties have an obligation to "provide the Commission with any further information or evidence as the Commission may request". The Conciliation Commission may also use a variety of means such as inquiry to gather any other information that may be required to propose a recommended settlement to the parties.

(3) The Conciliation Commission may consider it necessary to conduct independent fact-finding to gather relevant information concerning the dispute. This may include fact-finding within the territory of one or more parties to the dispute depending on the particular facts that are at issue. The parties have an obligation to "assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical." The Conciliation Commission would need to consult with the

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21/ United Nations, Treaty Series, vol. 71, p. 101.

22/ E.T.S. No. 23.

party to make the necessary practical arrangements for carrying out this fact-finding. The obligation of a State party to a dispute to permit fact-finding within its territory is a significant advancement over the present stage of development of the law relating to the peaceful settlement of disputes which generally requires the consent of the State. The Commission was of the view that the parties should permit fact-finding within their territories where necessary to resolve the dispute. The Commission also recognized that there may be exceptional cases in which it would be impractical for a State to permit such fact-finding. In such a case, the party must provide the Conciliation Commission with an explanation of the exceptional reasons for refusing to permit the fact-finding. This requirement is intended to enable the Conciliation Commission to determine whether the refusal is merely an attempt to obstruct the settlement process. The Conciliation Commission may draw appropriate inferences with respect to the disputed facts from the refusal of a party to the dispute to permit fact-finding within its territory. 23/

(4) Paragraph 3 addresses the second stage in the conciliation procedure. After completing the initial information gathering stage, the Conciliation Commission "may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations." These preliminary proposals may serve to expedite the dispute settlement process if the parties agree to the proposed settlement. This optional stage is also intended to provide the Conciliation Commission with an opportunity to obtain the views of the parties with respect to its proposed solution and, if it is

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23/ This is consistent with the decision of the International Court of Justice in the Corfu Channel case in which the Court stated as follows:

> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

Corfu Channel (Merits, Judgment), I.C.J. Reports 1949, p. 18.

not acceptable, to prepare a revised final recommendation in a further effort to achieve a settlement. The Conciliation Commission is not required to submit, nor are the parties entitled to request, any preliminary proposals.

(5) Paragraph 3 is also intended to allow the Conciliation Commission to make preliminary proposals in the nature of interim measures. These measures may, for example, call upon the parties to the dispute to refrain from any action that might cause irreparable harm or further complicate the task of settling the dispute. The Conciliation Commission may propose, on its own initiative and at its discretion, any appropriate interim measures with a view to facilitating a settlement of the dispute. The parties are not entitled to request such measures. The interim measures would be recommendatory in nature in accordance with the non-binding character of the conciliation procedure. The Vienna Convention on the Law of Treaties also provides that the conciliation commission envisaged in the annex thereto "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement." 24/

(6) Paragraph 4 concerns the third stage in the conciliation procedure. After gathering the necessary information and consulting the parties regarding any preliminary proposals, the Conciliation Commission is required to submit to the parties a report containing its recommendations for settling the dispute not later than three months after it has been constituted. This was considered to provide the Conciliation Commission with a reasonable period for completing its task. Furthermore, this relatively short period would not substantially delay the initiation of other dispute settlement procedures if the dispute could not be resolved by conciliation. The Conciliation Commission may specify in its report a period in which the parties are to respond to its recommendations. The parties may respond favourably to the recommendations resulting in an agreed settlement of the dispute. The parties may also respond by indicating that they have certain difficulties with the recommendation. The Conciliation Commission would have an opportunity in the latter instance to consider the views of the parties in making a further attempt to resolve the dispute, as provided for in paragraph 5 of the present article. The Conciliation Commission may impose time-limits on the parties for the submission of their observations on its recommendations to avoid

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24/ United Nations, Treaty Series, vol. 1155, p. 331.

unreasonable delay in the dispute settlement process. The use of the term "recommendations" is consistent with the non-binding character of the conciliation procedure.

(7) Paragraph 5 provides for a possible fourth stage in the conciliation procedure if the parties' response to the Conciliation Commission's recommendations has not resulted in an agreed settlement of the dispute. This final stage is intended to give the Conciliation Commission one last opportunity to bring the parties to the dispute to an agreed settlement. In view of the response of the parties, the Conciliation Commission may conclude that with some adjustments its recommendation may provide a basis for an agreed settlement. Thus, the Conciliation Commission may submit to the parties "a final report containing its own evaluation of the dispute and its recommendations for settlement." This is intended to enable the Conciliation Commission to provide the parties with its own assessment of the situation with a view to facilitating an agreed settlement of the dispute rather than its evaluation of the appropriateness of the parties' responses to its recommendations. However, the Conciliation Commission may conclude that submitting a final report would not serve any useful purpose and therefore decide not to submit such a report. For example, the response of the parties may indicate that the Conciliation Commission's recommendation or any variation thereof does not provide a basis for an agreed settlement or the parties may have agreed to initiate another dispute settlement procedure.

Article 5

Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

2. In cases, however, where the dispute arises between States parties to the present draft articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

Commentary

(1) Article 5 provides for two types of arbitration, namely, (1) voluntary arbitration by agreement of the parties to the dispute in the context of the

general dispute settlement system, and (2) compulsory arbitration at the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures as a special regime for settling disputes involving the use of countermeasures.

(2) Paragraph 1 provides for arbitration by agreement of the parties to the dispute as the fourth step in the general dispute settlement system. It is intended to address situations in which the dispute has not been resolved within a reasonable period as a result of any of the first three steps in the general dispute settlement system provided for in articles 1, 2 and 3 or by any other means. The present paragraph provides that the parties may agree to submit their dispute to arbitration in two situations: (1) the conciliation procedure envisaged in article 3 has not been instituted or (2) the conciliation procedure has been instituted but the parties have failed to reach an agreed settlement of their dispute six months after the Conciliation Commission's non-binding report. The Revised General Act for the Pacific Settlement of International Disputes also provides in article 21 for the possibility of arbitration in the event that a prior conciliation procedure has failed to result in the parties' agreed settlement of their dispute. 25/

(3) The present paragraph is intended to provide for the possibility of a binding third party dispute settlement procedure as an effective means of settling disputes between States parties to the present draft articles within the framework of the general dispute settlement system. The parties may prefer to first attempt to settle their dispute by means of negotiations without the participation of a third party or by means of a non-binding third party procedure before submitting their dispute to a binding third party procedure. However, the parties may also prefer to expedite the dispute settlement process by agreeing to submit their dispute to arbitration or judicial settlement without first attempting to resolve the dispute by other means. Similarly, the parties to the dispute may by agreement determine the terms of reference and the constitution of the arbitral tribunal. In the absence of such an agreement, the parties may submit their dispute to an arbitral tribunal which is constituted in conformity with the Annex and which has the terms of reference provided for in the succeeding article. These

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25/ United Nations, Treaty Series, vol. 71, p. 101.

residual provisions are intended to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters and that the agreement of the parties to settle their dispute by means of arbitration can be effectively implemented.

(4) Paragraph 2 establishes a special regime of compulsory arbitration if a dispute arises in which the injured State has taken countermeasures. In such a case, the allegedly wrongdoing State which is the object of the countermeasures has the right to initiate unilaterally compulsory arbitration. The injured State for its part does not have the right to unilaterally institute the arbitral proceedings. Rather it is bound after having taken countermeasures to submit to arbitration. The exceptional nature of the special dispute settlement regime for disputes involving the use of countermeasures is indicated by the phrase "In cases, however". Thus, the allegedly wrongdoing State may institute the arbitral proceedings without attempting to first resolve the dispute by any of the other means envisaged in the general dispute settlement system. The phrase "at any time" is used to avoid any ambiguity in this regard.

(5) The countermeasure is the event that triggers the unilateral right of the allegedly wrongdoing State to institute compulsory arbitration. However, the scope of the arbitral proceedings extends not only to the lawfulness of the countermeasure, but also to the underlying dispute which led the injured State to take the countermeasure. This dispute, in its turn, may include not only issues relating to the secondary rules contained in the draft articles on State responsibility, but also the primary rules that are alleged to have been violated. As a practical matter, it would be difficult for an arbitral tribunal to determine the lawfulness of countermeasures without considering such related questions as whether a primary rule has been violated and whether the violation is attributable to the allegedly wrongdoing State. The broader approach to the scope of the arbitral proceedings would also promote a more complete, efficient and effective settlement of the dispute by resolving all of the related issues. There were different views in the Commission as to whether the draft articles on State responsibility should contain such far-reaching dispute settlement provisions.

(6) The terms of reference and the constitution of the arbitral tribunal for purposes of the compulsory arbitration are determined by the succeeding article and the Annex to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters.

Article 6

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles, shall operate under the rules laid down or referred to in the Annex to the present draft articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Commentary

(1) Article 6 defines the general terms of reference of the Arbitral Tribunal referred to in articles 5 and 7 (2).

(2) Paragraph 1 provides that the Arbitral Tribunal shall decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles". The first criterion recognizes that the dispute referred to the Arbitral Tribunal is determined by the issues of fact or law that are identified by the parties to the dispute as the subject of their disagreement. The second criterion is standard language used in the dispute settlement provisions contained in international agreements. The Commission recognized that this criterion required a degree of flexibility in the context of the present draft articles to ensure a resolution of the dispute between the parties. The Arbitral Tribunal may need to consider various factual and legal issues in order to resolve a dispute concerning the interpretation or the application of the provisions of the present draft articles, including those relating to countermeasures. For example, the Arbitral Tribunal may need to consider issues regarding the primary rules of international law relied on by the parties, the alleged violations of these rules, the attribution of any such violation to the allegedly wrongdoing State, the lawfulness of any countermeasures and the consequences of a violation of international law by either party with respect to any initial wrongful act or any unlawful

countermeasures. The phrase "any issue" is used to cover all issues of fact or law that may need to be decided by the Arbitral Tribunal to settle the dispute between the parties relating to the present draft articles.

(3) Paragraph 1 also provides that the Arbitral Tribunal shall decide any relevant issues "with binding effect" in conformity with the customary binding nature of arbitral awards. The Arbitral Tribunal may also need to issue binding interim or protective measures to facilitate a resolution of the dispute between the parties, including ordering the cessation of the wrongful act and the suspension of countermeasures. These measures would be of an interim nature pending the final resolution of the dispute by means of the arbitral award. The Arbitral Tribunal has the inherent power to issue such binding interim or protective measures as may be necessary to ensure the effective performance of the task with which it has been entrusted, namely the resolution of the dispute between the parties. This is consistent with the binding nature of this third party dispute settlement procedure. The Commission considered that the powers and procedures of an arbitral tribunal, including the power to order interim measures, were generally understood and did not need to be elaborated in the present paragraph.

(4) The present article provides that the Arbitral Tribunal must submit its decision to the parties "within six months from the date of completion of the parties' written and oral pleadings and submissions". The Commission considered it useful to provide a time limit for the completion of the work of the Arbitral Tribunal and that six months from the date of the final submissions of the parties was a reasonable period for doing so.

(5) Paragraph 2 provides that the Arbitral Tribunal "shall be entitled to resort to any fact-finding it deems necessary for the determination of the case". This paragraph recognizes the importance of an arbitral tribunal being able to resort to fact-finding when it considers this to be necessary to determine the facts at issue between the parties. The Arbitral Tribunal is entitled to engage in "any fact-finding" that it considers to be necessary to resolve the disputed factual issues, including fact-finding within the territory of a party to the dispute. Although the parties are not obligated to permit such fact-finding under this paragraph, the Commission considered that they should be encouraged to do so to facilitate the work of the Arbitral Tribunal and the settlement of their dispute. Furthermore, the Arbitral

Tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding, as discussed in relation to article 4.

Article 7

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of tne challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

Commentary

(1) Article 7 addresses the situation that may arise following an arbitration when one of the parties to the dispute challenges the validity of the resulting arbitral award. This situation may arise with respect to a dispute that is submitted to arbitration by agreement under the general dispute settlement system or by the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures under the special dispute settlement regime. This article is intended to discourage a party to any dispute from asserting frivolous claims of nullity as a means of avoiding compliance with an unfavourable arbitral award. It is also intended to prevent a party to a dispute involving the use of countermeasures from undermining the special dispute settlement regime with respect to those disputes by ignoring the results of the compulsory arbitration based on spurious assertions of nullity. If the parties fail to institute another procedure for settling the dispute relating to the validity of the award, the present article provides for an effective mechanism for resolving this dispute by instituting proceedings before the International Court of Justice at the unilateral request of any party. There were different views as to whether these situations should be addressed in Part Three. Some members expressed concern about adding an additional layer to the dispute settlement process by introducing a role for the International Court of Justice in relation to arbitral proceedings. The Commission decided to include the present article - not to provide for an appeal procedure - but to ensure the

effectiveness of the arbitration envisaged in article 5 as a means of settling disputes between States parties to the present draft articles. This provision is similar to articles 36 and 37 of the Model Rules on Arbitral Procedure.

(2) Paragraph 1 is intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. This paragraph provides that any party to the dispute may, by making a timely request, unilaterally refer a dispute relating to the validity of an arbitral award to the International Court of Justice if two conditions are met. First, any party to the dispute has challenged the validity of the arbitral award. Second, the parties have failed to agree to submit the dispute concerning the validity of the arbitral award to another tribunal within three months of the date of the award. The timeliness of the challenge of the validity of an arbitral award and the corresponding request for a judicial determination of its validity may vary depending on the particular grounds for nullity, as recognized in the Model Rules on Arbitral Procedure. 26/

(3) The competence of the International Court of Justice in the judicial proceedings envisaged in the first paragraph of the present article would be limited to either (1) confirming the validity of the arbitral award in the absence of any grounds for nullity or (2) declaring the total or partial nullity of the award on specified grounds. The Commission noted that the possible grounds for challenging the validity of an arbitral award were set forth in article 35 of the Model Rules on Arbitral Procedure. 27/ The

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26/ Article 36 of the Model Rules permits a party to challenge the validity of an arbitral award within six months of the rendering of the award on the following two grounds: (1) the tribunal has exceeded its powers or (2) the tribunal has failed to state the reasons for the award or seriously departed from a fundamental rule of procedure. The same article provides that a party may also challenge the validity of the arbitral award within 6 months of the discovery of relevant information and in any event within 10 years of the rendering of the award on the following 2 grounds: (1) corruption on the part of a member of the tribunal or (2) the nullity of the undertaking to arbitrate or the compromis. Yearbook ... 1958, vol. II, p. 86.

27/ Article 35 of the Model Rules on Arbitration provides as follows:

The validity of an award may be challenged by either party on one or more of the following grounds:

(a) That the tribunal has exceeded its powers;

Court would not be competent to review the factual or the legal determinations of the arbitral tribunal or the merits of the award. Thus, the present paragraph provides for a limited judicial proceeding concerning the validity of an arbitral award and not an appellate or a general review proceeding with respect to the merits of the award. There have been two such proceedings before the International Court of Justice. 28/ The arbitral award would remain final and binding on the parties to the dispute in the absence of a declaration of nullity. A decision of the International Court of Justice confirming the validity of an arbitral award would not provide a basis for recourse to the Security Council in the event of non-compliance with the arbitral award under Article 94 of the United Nations Charter since the obligations with respect to the settlement of the dispute are incumbent upon the parties by virtue of the arbitral award rather than the judicial decision confirming its validity. A proposal to provide such roles for the Court and the Security Court with respect to a party's non-compliance with an arbitral award was not accepted.

(4) Paragraph 2 addresses the situation in which the arbitral proceeding has failed to resolve the dispute between the parties as a consequence of a subsequent judicial proceeding declaring the invalidity of all or part of the arbitral award. The present paragraph provides that any party to the dispute may unilaterally submit the dispute consisting of the unresolved issues to a new arbitration in conformity with article 6. This arbitral proceeding could be viewed as the continuation or the completion of the voluntary arbitration agreed to by the parties or the compulsory arbitration initiated by the allegedly wrongdoing State against which countermeasures were taken under paragraphs 1 and 2, respectively, of article 5. The term "new" is used to indicate that the dispute consisting of the unresolved issues is to be settled

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(b) That there was corruption on the part of a member of the tribunal;

(c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

(d) That the undertaking to arbitrate or the compromis is a nullity.

Yearbook ... 1958, vol. II, p. 86.

28/ See the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: ICJ Reports 1960, p. 192 and Arbitral Award of 31 July 1989, Judgment, ICJ Reports 1991, p. 53.

by a new arbitral tribunal constituted in conformity with the Annex and with the terms of reference provided for in article 6. This is intended to ensure the availability of an effective procedure for resolving the continuing dispute between the parties without any unnecessary delay.

Annex

Article 1

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present draft articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of Part Three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Commentary

(1) Article 1 of the Annex provides for the constitution and the procedure of the Conciliation Commission envisaged in article 3 of Part Three.

(2) Paragraph 1 provides for a list of conciliators consisting of qualified jurists to be drawn up and maintained by the Secretary-General of the United Nations. Such a list is intended to facilitate the constitution of a conciliation commission without unnecessary delay following the initiation of this procedure under article 3 of Part Three. The present paragraph is similar to paragraph 1 of the Annex to the Vienna Convention on the Law of Treaties.

(3) Paragraph 2 establishes the procedure by which a party to the dispute may unilaterally initiate the compulsory conciliation provided for in article 3 of Part Three, namely by submitting a request to the Secretary-General leading to the constitution of the Conciliation Commission. The present paragraph, which is self-explanatory, sets out the procedure for the constitution of the Conciliation Commission and the selection of its chairman. This provision is similar to paragraph 2 of the Annex to the Vienna Convention on the Law of Treaties.

(4) Paragraph 3 provides for the continuation of the compulsory conciliation envisaged notwithstanding the failure of a party or parties to the dispute to participate in the procedure. The present paragraph is similar to article 12 of Annex V of the United Nations Law of the Sea Convention.

(5) Paragraph 4 addresses the situation in which there is a disagreement between the parties as to the competence of the Conciliation Commission. This paragraph provides that the Conciliation Commission shall decide any such question. This is a generally recognized principle with respect to third party dispute settlement procedures. The present paragraph is similar to article 13 of Annex V of the United Nations Law of the Sea Convention.

(6) Paragraph 5 provides that the Conciliation Commission shall determine its own procedure. It further provides that the Commission shall take "decisions" by a majority vote of the five members. The term "decisions" must be viewed in the light of the non-binding character of the conciliation procedure under which the Conciliation Commission's decisions are recommendatory in nature. This paragraph is similar to paragraph 3 of the Annex to the Vienna Convention on the Law of Treaties.

(7) Part Three recognizes that disputes may arise involving more than two State parties to the draft articles on State responsibility. Paragraph 6 of the present article indicates that the provisions relating to the constitution of the Conciliation Commission shall apply to multilateral disputes to the extent possible. This paragraph is similar to article 3 (h) of Annex V of the United Nations Law of the Sea Convention.

Article 2

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 5 and 7 (2) of Part Three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be

made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

Commentary

(1) Article 2 of the Annex provides for the constitution and the procedure of the Arbitral Tribunal envisaged in article 5 of Part Three.

(2) Paragraph 1 provides that the Arbitral Tribunal shall consist of five members, including the Chairman, appointed in conformity with the procedure set forth in the present paragraph. This provision, which is self-explanatory, is similar to article 22 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 of Annex VII to the United Nations Convention on the Law of the Sea. The Commission did not consider it necessary to provide for the maintenance of a list of potential arbitrators, as provided for in the latter instrument.

(3) Paragraph 2 addresses the situation in which there is a failure to appoint one or more members of the Arbitral Tribunal by the procedure envisaged in the preceding paragraph within a reasonable period of time. Three months following the request for the constitution of the Arbitral Tribunal was considered to provide a sufficient period for the appointment of its members. In such a case, the President, Vice-President or the senior member of the International Court of Justice would appoint the remaining

members of the Arbitral Tribunal, as envisaged in the present paragraph. This paragraph is intended to avoid any unreasonable delay in the constitution of the arbitral tribunal by providing an effective means for the appointment of its members by an objective and impartial third party in the event that the procedure envisaged in paragraph 1 fails to result in the appointment of all five members. The appointments made under the present paragraph may result in one - but not more than one - member of the Arbitral Tribunal being a national of a party to the dispute in accordance with paragraph 1. The additional conditions provided for in paragraph 2 are further attempts to ensure the impartiality of the members appointed by the procedure envisaged in the present paragraph. Paragraph 2 is similar to article 3 of Annex VII to the United Nations Convention on the Law of the Sea and article 3 of the Model Rules on Arbitral Procedure.

(4) Paragraph 3 provides for the appointment of a member of the Arbitral Tribunal in the event of a vacancy by the same procedure provided for the initial appointment. The phrase "within the shortest possible time" is intended to avoid any unnecessary delay in the arbitral procedure. This paragraph is similar to article 24 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 (f) of Annex VII of the United Nations Law of the Sea Convention.

(5) Paragraph 4 recognizes the obligation of the parties to agree on the specific subject-matter of the dispute to be submitted to arbitration, once the Arbitral Tribunal has been established, if they have not already done so. This paragraph is consistent with the customary practice in arbitration. It is similar to article 25 of the 1949 Revised General Act for the Pacific Settlement of Disputes

(6) Paragraph 5 enables the Tribunal to determine the dispute based on the application for arbitration if the parties have failed to agree as envisaged in the preceding paragraph three months after the constitution of the Arbitral Tribunal. The present paragraph is intended to avoid any unnecessary delay in the commencement of the arbitral procedure once the Tribunal has been constituted. Paragraphs 4 and 5 are similar to article 8 of the Model Rules on Arbitral Procedure.

(7) Paragraph 6 provides for the continuation of the arbitral procedure in the event of the failure of a party to participate in the procedure. This provision is intended to ensure that the dispute is effectively resolved by

means of arbitration notwithstanding any attempt by a party to obstruct the dispute settlement process. This paragraph is similar to article 9 of Annex VII to the United Nations Convention on the Law of the Sea. Article 1, paragraph 3 of the present Annex contains a similar provision with respect to conciliation.

(8) Paragraph 7 indicates that the Arbitral Tribunal shall determine its own procedure unless the parties have otherwise agreed with respect to its procedure. Decisions of the Tribunal are to be taken by a majority vote. This paragraph is similar to article 5 of Annex VII to the United Nations Convention on the Law of the Sea and article 12 of the Model Rules on Arbitral Procedure.